

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 JOSEPH FLORES,

10 Plaintiff,

11 v.

12 JAN MORGEN, *et al.*,

13 Defendants.

Case No. C08-5621 RJB/KLS

REPORT AND RECOMMENDATION

Noted For: April 17, 2009

14 Before the Court are two ex parte motions for injunctive relief filed by Plaintiff Joseph
15 Flores. Dkts. # 13 and 37. Mr. Flores requests, *inter alia*, access to legal materials and postage, a
16 transfer to another penal institution and the suspension of a corrections officer. *Id.*

17 Mr. Flores did not serve the Defendants with his motions. Thus, Defendants request that the
18 motions be stricken. Mr. Flores advises the Court and counsel that he did not receive defense
19 counsel's notice of appearance until January 14, 2009 and therefore, he filed his motions only with
20 the Court. Dkt. # 41. The Court notes, however, that Mr. Flores' second motion (Dkt. # 37) was
21 not served on defense counsel and that he continues to file letters and motions with the Court that
22 he has failed to properly note and serve on defense counsel.¹

23
24 ¹Mr. Flores is advised that if he seeks relief from the Court, he must set forth his requests in
25 a pleading or motion and that he must serve copies of all pleadings and motions on all Defendants
26 through their counsel of record pursuant to Fed.R.Civ.P. 5(b)(1). Pursuant to Fed.R.Civ.P. 5(d),
Mr. Flores is also required to attach and file a certificate of service stating that he has served all

1 Defendants have provided the Court with responses which have been considered by the
2 Court. Dkts. # 14 and 39. After careful review of the motions, Defendants' responses, and balance
3 of the record, the undersigned recommends that Mr. Flores' motions for injunctive relief be denied.

4 **I. Background and Relief Requested**

5 Mr. Flores filed his application to proceed *in forma pauperis* and proposed civil rights
6 lawsuit on October 14, 2008. Dkt. # 1. The Court granted his application to proceed *in forma*
7 *pauperis* and filed the complaint. Dkts # 4 and 5. Mr. Flores claims that while he was incarcerated
8 at the Washington Corrections Center (WCC), Defendants (who are employees of WCC) denied
9 him the use of his electric wheelchair and certain medications in violation of his Eighth Amendment
10 rights. Dkt. # 5, p. 3.

11 On or about December 24, 2008, Mr. Flores was transferred to Airway Heights Corrections
12 Center (AHCC). Dkt. # 9. Defendants have entered appearances, but have not answered the
13 complaint. Dkts. # 30 and 38. Defendants' motion to dismiss is pending. Dkt. # 36.

14 Mr. Flores sought to amend his pleading to add claims against employees of AHCC, but
15 failed to provide the Court with a proposed amended complaint. Dkt. # 25. Under separate order,
16 the Court is denying that motion.

17 Mr. Flores demands "legal access consisting of copies, books, mail, etc. ...", and seeks an
18 Order directing the DOC to enjoin the Defendants and "all other persons acting in concert and
19 participation with them" to allow him within 48 hours of request to "override the postage amount
20 for any legal mail being mailed to the United States District Court." Dkt. # 13. Mr. Flores further
21 requests that any Defendant denying him "legal access" be held in contempt of court. *Id.*

22 In his second motion, Mr. Flores claims that guards at AHCC have retaliated against him by
23 changing his medical records on the DOC computer and placing him in segregation without the use
24

25 Defendants with the pleading and/or motion every time he files and serves a document.

1 of his wheelchair. Dkt. # 37, p. 1. Mr. Flores seeks a transfer from AHCC to AVCC and an order
2 relieving CUS Burke of pay and benefits until this case is resolved. *Id.* If Mr. Flores is successful
3 in his litigation, Mr. Flores seeks a further order terminating CUS Burke’s employment from the
4 DOC. Dkt. # 37, p. 2.

5 **II. STANDARD OF REVIEW**

6 The purpose of preliminary injunctive relief is to preserve the status quo or to prevent
7 irreparable injury pending the resolution of the underlying claim. *Sierra On-line, Inc. v. Phoenix*
8 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). When seeking injunctive relief, the moving
9 party must show either (1) a likelihood of success on the merits and the possibility of irreparable
10 injury or (2) the existence of serious questions going to the merits and the balance of hardships
11 tipping in [the movant’s] favor.” *See Nike, Inc. v. McCarthy*, 379 F.3d 576, 580 (9th Cir.
12 2004)(quoting *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991)) (internal quotations
13 omitted). “These two alternatives represent extremes of a single continuum, rather than two
14 separate tests. Thus, the greater the relative hardship to [the movant], the less probability of
15 success must be shown.” *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999)
16 (internal quotations omitted). Under either test, the movant bears the burden of persuasion.
17 *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 869 (9th Cir. 2003).

18 **III. DISCUSSION**

19 Under the Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA), a plaintiff is not
20 entitled to prospective relief unless the court enters the necessary findings required by the Act:

21 The court shall not grant or approve any prospective relief unless the court finds that
22 such relief is narrowly drawn, extends no further than necessary to correct the
23 violation of a Federal right, and is the least intrusive means necessary to correct the
24 violation of the Federal right. The court shall give substantial weight to any adverse
25 impact on public safety or the operation of a criminal justice system caused by the
26 relief.

18 U.S.C. § 3626(a)(1)(A).

1 In civil rights cases, injunctions must be granted sparingly and only in clear and plain cases.
2 *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). This holding applies even more strongly in cases
3 involving the administration of state prisons. *Turner v. Safley*, 482 U.S. 78, 85, 107 S. Ct. 2254
4 (1987). “Prison administration is, moreover, a task that has been committed to the responsibility of
5 those [executive and legislative] branches and separation of powers concerns counsels a policy of
6 judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason
7 to accord deference to the appropriate prison authorities.” *Id.*

8 In order to justify the extraordinary measure of injunctive relief under Federal Rule of Civil
9 Procedure 65, the moving party bears a heavy burden. *Canal Authority of the State of Florida v.*
10 *Callaway*, 489 F.2d 567 (5th Cir. 1974). A party seeking a preliminary injunction must fulfill one of
11 two standards: the “traditional” or the “alternative.” *Johnson v. California State Bd. of*
12 *Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir.
13 1987). Although two tests are recognized, they are not totally distinct tests. Rather, they are
14 “extremes of a single continuum.” *Funds for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir.
15 1992).

16 Under the traditional standard, a court may issue preliminary relief if it finds that: (1) the
17 moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably
18 prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public
19 interest favors granting relief. *Cassim*, 824 F.2d at 795. Under the alternative standard, the moving
20 party may meet its burden by demonstrating either (1) a combination of probable success and the
21 possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships
22 tips sharply in its favor. *Id.* at 795.²

23
24 ²In addition, under Federal Rule of Civil Procedure 65(a)(1), no preliminary injunction can
25 be issued without notice to the opposing party. A temporary restraining order may be granted under
26 Rule 65(b), but only if:

1) it clearly appears from specific facts shown by affidavit or by the verified complaint

1 **A. First Motion - Access to Legal Materials and Override Of Postage Amount**

2 Mr. Flores seeks access to unidentified “copies, books, mail, etc.” to be ordered by the
3 DOC, along with an Order directing the DOC to enjoin the Defendants and “all other persons acting
4 in concert and participation with them” to allow him within 48 hours of a request to “override the
5 postage amount for any legal mail being mailed to the United States District Court.” Dkt. # 13. Mr.
6 Flores further requests that any Defendant denying him “legal access” be held in contempt of court.
7 *Id.*

8 The touchstone of an access to courts claim is whether the access to courts program provides
9 inmates with “meaningful access to the courts.” *Lewis v. Casey*, 518 U.S. 343, 351 (1996). This is
10 not a bright line test and an access to courts program is “evaluated as a whole to ascertain its
11 compliance with constitutional standards.” *Bounds v. Smith*, 430 U.S. 817, 832 (1997). In matters
12 such as development of access to courts programs, courts are to defer to the expertise of prison
13 officials. *Lewis*, 518 U.S. at 361 (prison officials are entitled deference with regard to access to
14 courts programs). Inmates’ rights of access to the courts are not unlimited, and the time, place and
15 manner in which they are provided can be regulated. *Lindquist v. Idaho State Bd. of Corrections*,
16 776 F.2d 851, 858 (9th Cir. 1985) (discussing access to the law library).

17 Before an inmate can bring a lawsuit for an access to courts violation, the inmate must have
18 standing. In *Lewis*, the Supreme Court held that to have standing to bring an access to courts claim,
19 an inmate must allege both that he was denied access to legal materials or advice and that this
20 denial harmed his ability to pursue non-frivolous legal action, that is, the inmate must show actual

21
22

23 that immediate and irreparable injury, loss or damage will result to the applicant
 before the adverse party or that party’s attorney can be heard in opposition, and

- 24 2) the [applicant] certifies to the court in writing the efforts, if any, which have been
25 made to give the notice and the reasons supporting the claim that notice should not be
 required.

1 injury. To show actual injury the inmate must, for example, show that because of the inadequate
2 library facilities or because of the prison regulations governing access and use of the library
3 facilities, the inmate was unable to file a complaint or that the inmate lost a case because the inmate
4 could not timely file critical pleadings. *Id.* at 351.

5 Demonstration of actual injury does not automatically result in a right of access violation.
6 *Lewis*, 518 U.S. at 353. A prison regulation impinging on a inmate's constitutional rights, even a
7 right of access to courts, is valid if it is reasonably related to legitimate penological interests. *Id.* In
8 addition, a showing of an inability to file a particular pleading is insufficient to establish a violation
9 of access to the courts. The litigation must actually be damaged. *Lewis v. Casey*, *supra*. Thus, Mr.
10 Flores must establish the existence of that damage. Mere conclusory allegations are insufficient to
11 make that showing. *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); *In re Rice*, 118 Wn.2d
12 876, 855-886, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421 (1992). Delays in
13 providing legal services are not of a constitutional magnitude in and of themselves. Even when such
14 delays result in actual injury, if the delay is the result of legitimate penological interests, there is no
15 constitutional violation. *Id.* Even the inability to file a particular pleading is insufficient to establish
16 a violation of access to the courts. *Lewis v. Casey*, *supra*.

17 At the outset, it is noted that the DOC is not a party to this lawsuit and therefore, this Court
18 lacks jurisdiction to grant the requested relief. In addition, Mr. Flores appears to seek unfettered
19 access to his legal materials and postage, but fails to identify why such unlimited and extraordinary
20 access is warranted. He has not alleged that he is being denied access or in what manner access to
21 his legal materials or postage is insufficient.³ Mr. Flores has not explained that he has been denied
22 the ability to meet a filing deadline with a court or that he has a court deadline pending with which
23 he must comply and is being denied access to necessary materials. Because he has not shown any

24
25 ³In fact, in his second motion for injunctive relief, Mr. Flores states that after he kited the
SMU counselor, he received his legal box the next day. Dkt. # 37, p. 2.

1 irreparable injury if he is not granted the extraordinary relief he has requested, Mr. Flores' motion
2 must be denied.

3 Defendants also object that Mr. Flores improperly raises issues in this motion that are not
4 material to his claims of cruel and unusual punishment that are the subject of his civil rights
5 complaint at issue in this case. The Court agrees. Mr. Flores makes no access to courts claim in his
6 complaint. Dkt. # 5. It is appropriate to grant in a preliminary injunction "intermediate relief of the
7 same character as that which may be granted finally." *De Beers Consol. Mines v. U.S.*, 325 U.S.
8 212, 220 (1945); *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997). However, a Court should
9 not issue an injunction when the relief sought is not of the same character, and the injunction deals
10 with a matter lying wholly outside the issues in the underlying action. *Id.*

11 For the foregoing reasons, the undersigned recommends that Mr. Flores' motion for
12 injunctive relief regarding access to his legal materials and order for an override on the postage
13 amount for mail directed to the District Court be denied.

14 **B. Second Motion - Transfer to AVCC and Suspension of CUS Burke**

15 In his second motion/letter, Mr. Flores claims that guards at AHCC have retaliated against
16 him by changing his medical records on the DOC computer and placing him in segregation without
17 the use of his wheelchair. Dkt. # 37, p. 1. Mr. Flores alleges that he was forced to sit outside of the
18 sergeant's office while Corrections Officer Martin and a black corrections officer discussed whether
19 he needed the use of his wheelchair and then CUS Burke left him to sit in the dayroom for four
20 hours without elevation for his legs. *Id.*, p. 2. Thereafter, Mr. Flores alleges that Corrections
21 Officers Alendorf, Smith and Chambers took him to the R-Unit holding cell where one of the SMU
22 correction officers yanked him out of his wheelchair and slammed him in back where his surgery
23 had been performed so hard that he almost passed out. *Id.* He was then forced into the back of a
24 car and driven to the SMU about 45 feet away. *Id.* Once he arrived in SMU, he asked about his
25 legal box and was told to kite the counselor for SMU. *Id.* He did so and received he legal box the

1 next day. *Id.*

2 Mr. Flores states that he needs “the court to move [him] to AVCC, Yakima, WA,” before he
3 end[s] up dead or hurt.” *Id.*, p. 2. Mr. Flores states that he is “real sick and real weak,” that he has
4 “been denied medical and access to legal,” and “mentioned in one of [his] other documents [that he]
5 feared the counselor Burke or CUS Hewston or any of AHCC would change things in the
6 computer.” *Id.*

7 Generally, a prisoner’s release or transfer from a prison will moot any claims for injunctive
8 relief relating to the prison’s policies unless the suit has been certified as a class action. *Preiser v.*
9 *Newkirk*, 422 U.S. 395, 402-03 (1975); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991); *Dilley*
10 *v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995); *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.
11 1986). To secure injunctive relief, a plaintiff must demonstrate “a very significant possibility” that
12 future harm will ensue. *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990). The burden
13 of showing a likelihood of a recurrence of harm is “firmly on the plaintiff.” *Id.* at 1251.

14 Mr. Flores sued employees at WCC for denying him the use of his electric wheelchair and
15 certain medications while he was incarcerated at WCC, which he alleges violated his Eighth
16 Amendment rights. Dkt. # 5, p. 3. Mr. Flores is no longer at WCC, but is currently residing at
17 AHCC. Dkt. # 37. Employees at WCC do not have the ability to control or direct actions of
18 individuals not a party to this lawsuit.

19 Although Mr. Flores has sought leave to amend his complaint to add AHCC employees and
20 allegations regarding the withholding of medical and disability accommodations at AHCC, he has
21 failed to provide the Court with a proposed amended complaint to date. Therefore, this Court does
22 not have jurisdiction over any staff at AHCC as they are not parties in this lawsuit. Accordingly,
23 Mr. Flores’ request for a preliminary injunction is moot.

24 In addition, it is well established that an inmate has no right to be housed in a particular
25 prison or to have any particular custody classification. *Olim v. Wakinekona*, 461 U.S. 238 (1983);

1 *Hernandez v. Johnston*, 833 F.2d 1316 (9th Cir. 1987); *Smith v. Noonan*, 992 F.2d 987 (9th Cir.
2 1993); *May v. Baldwin*, 109 F.3d 557 (9th Cir. 1997). However, the Eighth Amendment protects
3 against future harm and supports an injunction if an inmate proves the conditions in the prison are
4 unsafe and life threatening. *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993).

5 Mr. Flores alleges that he was hurt when he was forced to wait for four hours while the
6 officers examined his records and that one of the corrections officers slammed him in the back
7 where he had surgery and he almost passed out. Dkt. # 37, p. 2. However, Mr. Flores has offered
8 no evidence of a real and immediate threat of future harm.

9 Because he has failed to show that there is a real and immediate threat of future harm, the
10 undersigned recommends that Mr. Flores' second motion for preliminary injunction be denied.

11 IV. CONCLUSION

12 A proposed order accompanies this Report and Recommendation.

13 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
14 the parties shall have ten (10) days from service of this Report to file written objections. *See also*
15 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes
16 of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
17 72(b), the Clerk is directed to set the matter for consideration on **April 17, 2009**, as noted in the
18 caption.

19
20 DATED this 19th day of March, 2009.

21
22 

23 Karen L. Strombom
24 United States Magistrate Judge
25